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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Implementation of Section 309(j) of the
Communications Act Competitive Bidding

PP Docket No. 93-253

REPLY COMMENTS

Comcast Corporation ("Comcast"), by its attorneys, hereby submits its reply comments to the Federal Communications Commission's (the "Commission") Notice of Proposed Rulemaking ("Notice") regarding the application of competitive bidding to the assignment of certain radio spectrum.^{1/}

During the comment phase of this proceeding the Commission received over 200 responses to its Notice raising a variety of issues relating to the proper design and implementation of spectrum auctions. This Reply focuses on certain rule clarifications, auction design and related issues which, if not addressed sufficiently in advance, will seriously threaten the efficient development and deployment of Personal Communications Services ("PCS").

1/ See Notice of Proposed Rulemaking, PP Docket No. 93-253 (FCC 93-455) (adopted September 23, 1993).

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I. THE COMMISSION MUST CLARIFY ITS ELIGIBILITY AND QUALIFICATION RULES FOR COMPETITIVE BIDDING.

In the Notice, the Commission requests comment on the auction application process and the regulatory and financial requirements that must be satisfied in order to participate in the PCS spectrum auctions.^{2/} In particular, the Notice proposes use of a short-form auction application to be signed by each auction participant, certifying that the applicant is qualified to bid in accordance with Sections 309(a), 308(b) and 310 of the Communications Act and any other service-specific qualification rules that the Commission adopts.^{3/}

Although Comcast favors the Commission's proposal to require only the filing of a short form application prior to the auction, Comcast is concerned that the failure to establish clear, workable and appropriate eligibility and qualification rules and guidelines will result in applicant confusion, post-auction legal challenges and needless delay. In light of both Congress' and the Commission's desire for the prompt deployment of PCS and the significant financial and business consequences associated with auction disqualification, the Commission must adopt clear rules and guidelines for applicant eligibility and qualification.

2/ See Notice at ¶¶ 95-101.

3/ See Notice at ¶ 98. For broadband PCS, the Notice suggests that these short form applications will be a notice of an intention to bid in auctions to be held as early as May 1994, and are to be filed 60-45 days prior to the actual auction date.

A. The Commission Must Clarify Cellular Attribution and Ownership Triggers So That Parties Can Efficiently Plan Their Auction Participation.

Although the Commission viewed itself as offering simple ownership and market-based tests for determining in-market cellular eligibility, the comments filed in this proceeding overwhelmingly demonstrate the need for further clarification and definition of the cellular attribution and ownership rules for PCS and PCS auctions.^{4/} While many of Comcast's concerns also may be addressed by reconsideration of the PCS Report and Order, ultimately Comcast does not believe it to be wise or appropriate for the Commission to avoid the establishment of detailed attribution/insulation standards which would result in greater certainty for auction participants.

This is particularly important given the Commission's statement of its intention to "review carefully" any instances in which compliance with its purportedly clear cellular eligibility rules nonetheless do not achieve the

4/ See Second Report and Order, GEN Docket No. 90-314 (FCC 93-451) (adopted September 23, 1993) (hereafter "PCS Report and Order"). According to the recently adopted PCS rules, an auction applicant for any of the 30 MHz and 20 MHz spectrum blocks may have no more than a 20% ownership interest in a cellular carrier covering a cellular geographic service area ("CGSA") that has more than a 10% overlap with the target MTA or BTA. The 10% overlap is defined by population and interests in multiple systems are aggregated, even if they are below 10%, to obtain the "net overlap." Further, since the Commission has not established attribution rules, the 20% ownership restriction could be deemed to apply to indirect holdings or parent corporations that are several layers removed from the cellular licensee. While Comcast will file a petition for reconsideration of aspects of the PCS Report and Order, some aspects of the ownership limits of the PCS Report and Order are directly related to the auction policies and procedures that are the subject of this proceeding.

Commission's goals with respect to cellular eligibility.^{5/} That broad pronouncement alone could result in extensive post-auction litigation, all to the detriment of the auction process and PCS.^{6/} More important, the potential reach of such a broad, subjective standard could have a chilling effect upon PCS that will extend far beyond what the Commission intends.

The Commission's stated purpose in establishing the cellular eligibility restrictions was to address perceived anti-competitive dangers.^{7/} However, the current restrictions simply fail to effectively address the Commission's expressed concerns, and instead foster inequities and confusion that will deprive the auction marketplace of valuable investment resources. In order to correct the distortions that its current rules will promote, the Commission should create a level of certainty for those parties prepared to venture large amounts of capital in PCS auctions. While the "fine legal distinctions" of broadcast attribution rules are imperfect, and may not be optimal for use in PCS, they at least offer a ready body

5/ See PCS Report and Order at ¶¶ 109-110.

6/ Ironically, the Commission will more than likely resort to the broadcast attribution rules that it is now attempting to avoid to guide the resolution of the many claims that arise from its inattentiveness to this issue.

7/ See PCS Report and Order at ¶ 105. These comments do not address the necessary changes to PCS ownership restrictions. Comcast limits its Reply to impact of ill-defined ownership restrictions upon the proposed PCS auction process.

of interpretive law that permits interested parties to fashion their business holdings accordingly.^{8/}

B. The Timing Of The Qualification Certification For PCS Bidding Must Permit Applicants A Reasonable Opportunity To Conform Their Business Arrangements.

In addition to its general concern with the lack of guidance offered with respect to cellular attribution and eligibility rules, Comcast is concerned that a pre-auction certification requirement will inhibit the potential for aggressive bidding and will ultimately stifle competition in the PCS marketplace. Specifically, without further elaboration by the Commission, this requirement may disqualify potential PCS providers who, at the time of auction, are constrained by the cellular eligibility rules recently adopted by the Commission.^{9/}

The Notice appears to suggest that parties will be deemed ineligible for 30 MHz and 20 MHz PCS licenses based upon the 20% ownership and 10% overlap tests at the time they file their short form application. As a result, the Notice's proposals appear to require such entities either to undertake a radical restructuring of their operations based only on the hope of winning a PCS license,

8/ If the Commission fails to clarify its attribution and ownership rules, it should not penalize auction participants with disqualification or otherwise if those rules are unintentionally violated in the bidding process.

9/ Comcast does not object to the proposed requirement of a certification. Rather, Comcast believes that the demonstration of legal qualification should be made subsequent to the auction, once auction winners have been confirmed and the license winner's application is ready to be processed.

or to forego the opportunity to participate meaningfully in PCS because of their then current cellular interests.

In order for the Commission to fulfill its expressed commitment to a competitive PCS environment, the timing of the qualification certification for bidding must permit applicants a reasonable opportunity to conform their business arrangements to articulated service eligibility rules. It should not be surprising that individuals and companies with directly or indirectly held cellular interests will desire to compete for PCS licenses, even if it would require some degree of corporate restructuring or modification. However, it is unreasonable to expect an individual or company to embark upon any such restructuring or modification in advance of its winning a PCS auction.

A flexible framework for the acceptance of auction applications, specifically providing for changes in ownership, will be indispensable to aggressive participation in PCS and to the maximization of auction revenues.^{10/} The Commission must permit applicants a reasonable time to conform their business arrangements to regulatory mandates if it intends to create an efficient, innovative and competitive PCS marketplace.^{11/}

^{10/} Conditional certifications of qualification are commonly accepted in the broadcasting services.

^{11/} A number of commenters in this proceeding agree that the ability to participate in the PCS auction should not require compliance with the eligibility rules prior to the auction itself. See e.g. Comments of Ameritech at 2; Comments of Pacific Bell and Nevada Bell at 14-17; Comments of General Communication, Inc. at 8; Comments of Sprint Corporation at 7. Rather, the Commission should
(continued...)

However, consistent with the need to efficiently and quickly deploy PCS, the Commission's rules must also limit the degree of restructuring parties entering into PCS auctions are permitted. Allowing massive business reconfigurations that will require extensive federal, state and local regulatory review and approval would interject a significant and unnecessary level of uncertainty into the bidding process and hinder swift service deployment.

For example, the Commission should not go so far as to accept U S West's proposal that it be permitted to enter into contingent bidding arrangements and later divest its cellular operations in markets where it would otherwise be disqualified if in order to do so U S West would require local and state public service commission and other similar regulatory approvals which could not be obtained without undue delay.^{12/} Rather, the Commission should establish a six month period from the date of auction in order to permit parties a reasonable degree of planning flexibility. In addition, the Commission should perform expedited reviews of any cellular assignment or transfer of control applications filed in connection with these corporate restructurings.

^{11/} (...continued)

obtain from the potential auction participants a firm commitment to demonstrate compliance once a license is won and not before. Demanding a corporate reorganization or divestiture prior to this time only would promote market inefficiencies and result in a tremendous waste of resources.

^{12/} See U S West Ex Parte filing of August 4, 1993, GEN. Docket No. 90-314 at 2.1.

C. The Attribution And Eligibility Rules Must Be Clarified In Consortium And Combinatorial Bidding.

The Notice also does not fully address auction eligibility rules as they may apply with respect to consortia and combinatorial bidding. Again, unless the rules are made plain, the Commission may face the prospect of post auction bidder disqualifications that will do little to speed new PCS services to the public.

First, Comcast does not believe that a consortium applying for a 30 MHz or 20 MHz PCS license, and which has an in-market cellular licensee as one of its members, should be disqualified at the application or auction stage on the basis of that cellular entity's participation in the consortium. Rather, the consortium should be permitted to affirm in its application that such cellular entity's ownership interests in the PCS licensee will comply with all applicable Commission requirements. In that way, consortium bidding on multiple markets will not need to fix their ownership relationships for each market prior to the determination of which markets are won and auction prices for such markets. So long as the PCS licensee is in compliance with the applicable cellular eligibility and other PCS ownership restrictions at the time of award, no harm will have come from affording such flexibility in the Commission's rules and many parties (and therefore the auction process) will benefit.

Second, while Comcast does not favor the use of nationwide combinatorial bidding for all the reasons set forth in its initial comments, Comcast believes that if a company with cellular ownership interests is bidding for PCS licenses as part of a nationwide or region-wide bidding consortium, the relevant

cellular interest for purposes of qualification in any particular market should be analyzed by reviewing the cellular presence/overlap in all contiguous markets that the parties win by bidding. This analysis accounts directly for the cellular overlap in the particular markets the combinatorial bidding parties select as their relevant PCS market.

D. Tax Certificates Must Be Made Available If Radical Divestiture Is To Be The Only Method Of Compliance With PCS Auction Eligibility Requirements.

The public interest will not be served by auctions if cellular licensees or those individuals, companies or partners that hold cellular interests directly or indirectly continue to have ambiguous eligibility restrictions attached to their PCS participation. However, if the Commission fails to clarify the attribution standards it intends to apply, and those with cellular interests are forced to initiate divestiture in order to participate in PCS, the Commission must give the divesting cellular entity a tax certificate in recognition of the dislocations created by the Commission's PCS eligibility rules. For instance, the ability to use tax certificates has been afforded to microwave incumbents in the 2 GHz spectrum band who are subject to relocation to higher frequency bands under the Commission's PCS band-clearing transition rules.^{13/}

Divestiture or reorganization can be both complicated and costly and are made all the more so by the need to prosecute cellular license transfers and

^{13/} See Third Report and Order and Memorandum Opinion and Order, 8 FCC Rcd 6589, 6605-06 (1993).

assignments. Unless some accommodation is made, creative, successful and knowledgeable companies may needlessly be barred from PCS markets that would benefit from their participation. It would be inequitable for the Commission to require that these alterations be made in order to participate in the PCS auctions and not address the tax consequences of the required divestitures. Unless provisions are made to reduce the negative tax consequences of the reorganizations, the companies will find themselves disadvantaged from the outset, and perhaps completely restrained from PCS participation altogether.

II. CONCLUSION

Comcast believes that a diverse, competitive and innovative PCS marketplace can occur with auctions only if the eligibility ground rules are clarified in the manner described in these comments. Comcast requests that the Commission adopt auction rules that provide sufficient clarity to permit interested parties to plan their business arrangements for auction participation.

Respectfully submitted,

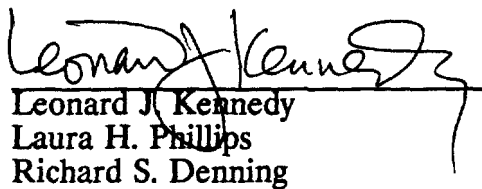
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